

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

**RE: PETITION OF BAY STATE GAS COMPANY
TO INCUR LONG-TERM DEBT OF UP TO \$50,000,000**

DTE 02-73

**OPPOSITION OF LOCAL 273, UTILITY WORKERS UNION OF AMERICA
TO BAY STATE MOTION TO STRIKE**

I. INTRODUCTION

Local 273 of the Utility Workers Union of America (“Local 273”) hereby opposes the “Motion of Bay State Gas Company to Strike Portions of Initial Brief of Local 273.”

II. ARGUMENT

Bay State Gas Company (“Bay State”) moves to strike two portions of the brief submitted by Local 273 in this case: a quotation from a statement from Local 273's president, as appearing in the transcript of the case (Local 273 Br., at 2), and an argument that the Department should open an investigation into Bay State's financial condition and operations (Local 273 Br., at 5-7).

A. The Quotation of a Statement Made at the Public Hearing Should Not be Stricken

At page 2 of its brief (“Introduction”), Local 273 quotes from an unsworn statement made by its president, Kevin Friary, at the public hearing in this case. At this point in its brief, Local

273 does not make argument regarding this statement. Nor does Local 273 state or imply in this introduction that Mr. Friary's statement was made under oath or should be considered evidence in this case.

The Department's rules specifically recognize that individuals may make "unsworn statements appearing in the record" of a case. 220 CMR 1.10(1). However, these statements "shall not considered as evidence on which a decision may be based." *Id.* Local 273 is not asking the Department to consider Mr. Friary's statement as evidence in this case, and the mere recitation of his statement in an introductory summary of the case should not be stricken.

B. The Department Should Not Strike Local 273's Argument Seeking an Investigation

In its brief (at 5-7), Local 273 urges the Department to "open an investigation into and management audit of Bay State's financial condition and operations." In this portion of its argument, Local 273 relies upon or references four completely unobjectionable record sources and legal citations: the Department's prior decision in DTE 98-31 (the Bay State merger case); the cross-examination of Bay State's own witness, Vincent Rea; a decision of the Supreme Judicial Court regarding financing under G.L. c. 164; and a decision of the Maine Public Utilities Commission regarding Bay State's subsidiary Northern Utilities. Local 273 also references the statement made by Mr. Friary, to which Bay State strongly objects.

Before addressing Bay State's argument that *all* of these references and citations should be stricken, along with all of Local 273's related argument on pages 5 - 7, Local 273 notes that in the remainder of its brief (at 8-15) it directly addresses Bay State's \$50 million financing request.

At pages 8-15, Local 273 argues that: (I) the Department should explicitly state that a ruling in this financing case cannot be construed as approval of any particular ratemaking treatment of the related interest costs; (ii) the Department should address the “regulatory ringfencing” problems identified by Bay State’s rating agencies; (iii) the Department should not allow Bay State to issue 20-year bonds; and (iv) Bay State has not made the “public interest” showing required for a waiver under G. L. c. 164, § 15. All of these arguments are based fully on record evidence and relevant legal authority, and Bay State moves to strike no portion of these arguments.

Local 273 acknowledges that pages 5-7 of its brief address issue that can only be fully addressed in a subsequent docket (the investigation that Local 273 requests), not the present one. Local 273 does not already have, and therefore cannot cite, the evidence that such an investigation might reveal. Instead, Local 273 is calling upon the Department to carry out one of its most important obligations, the “protection of public interests,” *Fitchburg Gas & Electric Light Company*, 394 Mass. 671, 678 (1985), by opening up an investigation of Bay State’s financial condition and operations. Local 273 requests this investigation precisely because the present proceeding, which has a relatively narrow focus and a highly expedited schedule¹, is not a good vehicle for addressing the impacts that Bay State’s merger have had on the company’s finances and operations.

The Department clearly has the inherent power to open such an investigation, even on its own motion. *See* G. L. c. 164, §§ 76, 76A, 85, & 93; *see also Fitchburg, supra*. The Department does not need formally-admitted evidence in order make a determination to open an

¹ The Department’s initial Order of Notice in this case is dated November 21, 2002. Within one month, all discovery, hearings, and filing of briefs were completed.

investigation,² despite the fact that it does need to rely upon formally-admitted evidence to make the other determinations Bay State or intervenors seek in this case. 220 CMR 1.10(1).

In making its request to the Department, Local 273 does reference the statement made by its president, which statement was not made under oath. However, there is more than a sufficient basis for the Department to open an investigation based on the other record references and legal citations made by Local 273, including the discrepancies between Bay State's representations to the Department in DTE 98-31 and the actual, more adverse post-merger experience (Local 273 Br., at 5); the statements of Bay State's own witness regarding the reasons why the company's bond ratings have fallen so far (*id.*); and the formal, published decision of the Maine commission to audit Bay State's Maine subsidiary, Northern Utilities. To the extent that Local 273 referenced the statement of Mr. Friary, it is not asking the Department to consider those as evidence for any determination the Department may make in this case. The Department has broad discretion to open investigations on its own motion, and it has done so on numerous occasions. Local 273 continues to urge the Department to open the requested investigation so that the Department will be able to obtain evidence of the impact of the Bay State-NiSource merger on Bay State's operations and financial condition.

² See, e.g., *investigation by the Department of Telecommunications and Energy on its own Motion to Establish Guidelines for Service Quality Standards for Electric Distribution Companies and Local Gas Distribution Companies Pursuant to G. L. c. 164, §1E*, Order Opening a Notice of Inquiry (October 29, 1999).

III. CONCLUSION

Bay State's motion to strike should be denied.

Respectfully Submitted,

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